

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

MARK A. KIRKPATRICK,  
Plaintiff,  
v.  
MICHAEL J. ASTRUE, Commissioner  
of Social Security,  
Defendant.

)  
) No. CV-08-00224-JPH  
)  
) ORDER GRANTING DEFENDANT'S  
) MOTION FOR SUMMARY JUDGMENT  
)  
)  
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BEFORE THE COURT are cross-motions for summary judgment noted for hearing without oral argument on March 20, 2009. (Ct. Rec. 15, 19). Attorney Maureen J. Rosette represents Plaintiff; Special Assistant United States Attorney Richard M. Rodriguez represents the Commissioner of Social Security ("Commissioner"). The parties have consented to proceed before a magistrate judge. (Ct. Rec. 7.) After reviewing the administrative record and the briefs filed by the parties, the court **GRANTS** Defendant's Motion for Summary Judgment (Ct. Rec. 19) and **DENIES** Plaintiff's Motion for Summary Judgment (Ct. Rec. 15.)

## JURISDICTION

Plaintiff protectively filed applications for disability insurance benefits (DIB) and supplemental security income (SSI)

1 benefits on July 26, 2005, alleging onset as of November 1, 1996.  
 2 (Tr. 60-64, 424-427.) The applications were denied initially and  
 3 on reconsideration. (Tr. 29-30, 33-35, 416-417, 419-422.)  
 4 Administrative Law Judge (ALJ) R. J. Payne held a hearing on  
 5 November 27, 2007. (Tr. 443-486.) Plaintiff, represented by  
 6 counsel, and experts Ronald M. Klein, Ph.D., and Marvin S. Wolf,  
 7 M.D., testified. At the hearing plaintiff amended the onset date  
 8 to July 26, 2005 and agreed to dismissal of his DIB claim. (Tr.  
 9 457.) On December 6, 2007, the ALJ issued a decision finding that  
 10 plaintiff was disabled, but substance abuse materially contributed  
 11 to the finding, barring eligibility. (Tr. 12-23.) The Appeals  
 12 Council denied a request for review on June 27, 2008. (Tr. 2-5.)  
 13 Therefore, the ALJ's decision became the final decision of the  
 14 Commissioner, which is appealable to the district court pursuant  
 15 to 42 U.S.C. § 405(g). Plaintiff filed this action for judicial  
 16 review pursuant to 42 U.S.C. § 405(g) on July 15, 2008. (Ct. Rec.  
 17 1, 4.)

#### **STATEMENT OF FACTS**

19 The facts have been presented in the administrative hearing  
 20 transcript, the ALJ's decision, the briefs of both Plaintiff and  
 21 the Commissioner, and will only be summarized here.

22 Plaintiff was 52 years old on the amended onset date and  
 23 earned a GED. (Tr. 465-466.) Plaintiff has past relevant work as  
 24 a machinist. (Tr. 102, 466-467.) He alleges disability as of the  
 25 amended onset date, July 26, 2005, due to right shoulder  
 26 impingement, chronic obstructive pulmonary disease (COPD), neck  
 27 pain, polysubstance dependence, and depression. (Tr. 29, 31.)

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## **SEQUENTIAL EVALUATION PROCESS**

The Social Security Act (the "Act") defines "disability" as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also provides that a Plaintiff shall be determined to be under a disability only if any impairments are of such severity that a plaintiff is not only unable to do previous work but cannot, considering plaintiff's age, education and work experiences, engage in any other substantial gainful work which exists in the national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B). Thus, the definition of disability consists of both medical and vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9<sup>th</sup> Cir. 2001).

17 The Commissioner has established a five-step sequential  
18 evaluation process for determining whether a person is disabled.  
19 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person  
20 is engaged in substantial gainful activities. If so, benefits are  
21 denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If  
22 not, the decision maker proceeds to step two, which determines  
23 whether plaintiff has a medically severe impairment or combination  
24 of impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii),  
25 416.920(a)(4)(ii).

If plaintiff does not have a severe impairment or combination of impairments, the disability claim is denied. If the impairment

1 is severe, the evaluation proceeds to the third step, which  
2 compares plaintiff's impairment with a number of listed  
3 impairments acknowledged by the Commissioner to be so severe as to  
4 preclude substantial gainful activity. 20 C.F.R. §§  
5 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P  
6 App. 1. If the impairment meets or equals one of the listed  
7 impairments, plaintiff is conclusively presumed to be disabled.  
8 If the impairment is not one conclusively presumed to be  
9 disabling, the evaluation proceeds to the fourth step, which  
10 determines whether the impairment prevents plaintiff from  
11 performing work which was performed in the past. If a plaintiff  
12 is able to perform previous work, that Plaintiff is deemed not  
13 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).  
14 At this step, plaintiff's residual functional capacity ("RFC")  
15 assessment is considered. If plaintiff cannot perform this work,  
16 the fifth and final step in the process determines whether  
17 plaintiff is able to perform other work in the national economy in  
18 view of plaintiff's residual functional capacity, age, education  
19 and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),  
20 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

21 The initial burden of proof rests upon plaintiff to establish  
22 a *prima facie* case of entitlement to disability benefits.

23 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9<sup>th</sup> Cir. 1971); *Meanel v.*  
24 *Apfel*, 172 F.3d 1111, 1113 (9<sup>th</sup> Cir. 1999). The initial burden is  
25 met once plaintiff establishes that a physical or mental  
26 impairment prevents the performance of previous work. The burden  
27 then shifts, at step five, to the Commissioner to show that (1)  
28

1 plaintiff can perform other substantial gainful activity and (2) a  
 2 "significant number of jobs exist in the national economy" which  
 3 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9<sup>th</sup>  
 4 Cir. 1984).

#### 5 STANDARD OF REVIEW

6 Congress has provided a limited scope of judicial review of a  
 7 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold  
 8 the Commissioner's decision, made through an ALJ, when the  
 9 determination is not based on legal error and is supported by  
 10 substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995  
 11 (9<sup>th</sup> Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9<sup>th</sup> Cir.  
 12 1999). "The [Commissioner's] determination that a plaintiff is  
 13 not disabled will be upheld if the findings of fact are supported  
 14 by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572  
 15 (9<sup>th</sup> Cir. 1983) (citing 42 U.S.C. § 405(g)). Substantial evidence  
 16 is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d  
 17 1112, 1119 n. 10 (9<sup>th</sup> Cir. 1975), but less than a preponderance.  
 18 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9<sup>th</sup> Cir. 1989);  
 19 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d  
 20 573, 576 (9<sup>th</sup> Cir. 1988). Substantial evidence "means such  
 21 evidence as a reasonable mind might accept as adequate to support  
 22 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)  
 23 (citations omitted). "[S]uch inferences and conclusions as the  
 24 [Commissioner] may reasonably draw from the evidence" will also be  
 25 upheld. *Mark v. Celebreeze*, 348 F.2d 289, 293 (9<sup>th</sup> Cir. 1965).  
 26 On review, the Court considers the record as a whole, not just the  
 27 evidence supporting the decision of the Commissioner. *Weetman v.*  
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*Sullivan*, 877 F.2d 20, 22 (9<sup>th</sup> Cir. 1989) (quoting *Kornock v. Harris*, 648 F.2d 525, 526 (9<sup>th</sup> Cir. 1980)).

3 It is the role of the trier of fact, not this Court, to  
4 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If  
5 evidence supports more than one rational interpretation, the Court  
6 may not substitute its judgment for that of the Commissioner.  
7 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579  
8 (9<sup>th</sup> Cir. 1984). Nevertheless, a decision supported by  
9 substantial evidence will still be set aside if the proper legal  
10 standards were not applied in weighing the evidence and making the  
11 decision. *Brawner v. Secretary of Health and Human Services*, 839  
12 F.2d 432, 433 (9<sup>th</sup> Cir. 1987). Thus, if there is substantial  
13 evidence to support the administrative findings, or if there is  
14 conflicting evidence that will support a finding of either  
15 disability or nondisability, the finding of the Commissioner is  
16 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9<sup>th</sup> Cir.  
17 1987).

## **ALJ' S FINDINGS**

19 The ALJ found at step one that plaintiff has not engaged in  
20 substantial gainful activity since onset. (Tr. 15.) At steps two  
21 and three, the ALJ found that plaintiff suffers from right  
22 shoulder impingement, COPD, neck pain, poly-substance dependence,  
23 and depression, impairments that are severe. (Tr. 15.) The ALJ  
24 found that when substance dependence is included, plaintiff's  
25 impairments meet the requirements of Listings 12.04 (depression)  
26 and 12.09 (substance abuse). (Tr. 16.) The ALJ performed an

1 analysis pursuant to *Bustamante*<sup>1</sup> to determine whether plaintiff  
 2 would be disabled if he stopped abusing substances. (Tr. 16-18.)  
 3 ALJ Payne found that even if not abusing substances, plaintiff  
 4 would be unable to perform his past relevant work. (Tr. 21-22.)  
 5 If plaintiff stopped substance abuse, he would be found "not  
 6 disabled" using the framework of Medical-Vocational guideline  
 7 202.14. (Tr. 22.) Because plaintiff would not be disabled if  
 8 he stopped abusing substances, substance abuse is a contributing  
 9 factor material to the disability determination. (Tr. 22-23.)  
 10 Accordingly, the ALJ found that plaintiff is barred from receiving  
 11 benefits under the Social Security Act. (*Id.*)

## 12 ISSUES

13 Plaintiff contends that the Commissioner erred as a matter of  
 14 law by improperly weighing the medical evidence, and urges the  
 15 court to consider an opinion rendered after the hearing when  
 16 determining whether he is entitled to benefits or a remand for  
 17 further administrative proceedings. (Ct. Rec. 16 at 9-15.)

18 The Commissioner responds that the ALJ appropriately weighed  
 19 the medical evidence and asks the court to affirm his decision.  
 20 (Ct. Rec. 20 at 24).

## 21 DISCUSSION

### 22 A. Weighing medical evidence

23 In social security proceedings, the claimant must prove the  
 24 existence of a physical or mental impairment by providing medical  
 25 evidence consisting of signs, symptoms, and laboratory findings;

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 27 <sup>1</sup>*Bustamante v. Massanari*, 262 F. 3d 949 (9<sup>th</sup> Cir. 2001).  
 28

1 the claimant's own statement of symptoms alone will not suffice.  
2 20 C.F.R. § 416.908. The effects of all symptoms must be  
3 evaluated on the basis of a medically determinable impairment  
4 which can be shown to be the cause of the symptoms. 20 C.F.R. §  
5 416.929. Once medical evidence of an underlying impairment has  
6 been shown, medical findings are not required to support the  
7 alleged severity of symptoms. *Bunnell v. Sullivan*, 947, F. 2d  
8 341, 345 (9<sup>th</sup> Cir. 1991).

9 A treating physician's opinion is given special weight  
10 because of familiarity with the claimant and the claimant's  
11 physical condition. *Fair v. Bowen*, 885 F. 2d 597, 604-05 (9<sup>th</sup>  
12 Cir. 1989). However, the treating physician's opinion is not  
13 "necessarily conclusive as to either a physical condition or the  
14 ultimate issue of disability." *Magallanes v. Bowen*, 881 F.2d 747,  
15 751 (9<sup>th</sup> Cir. 1989) (citations omitted). More weight is given to  
16 a treating physician than an examining physician. *Lester v.*  
17 *Cater*, 81 F.3d 821, 830 (9<sup>th</sup> Cir. 1996). Correspondingly, more  
18 weight is given to the opinions of treating and examining  
19 physicians than to nonexamining physicians. *Benecke v. Barnhart*,  
20 379 F. 3d 587, 592 (9<sup>th</sup> Cir. 2004). If the treating or examining  
21 physician's opinions are not contradicted, they can be rejected  
22 only with clear and convincing reasons. *Lester*, 81 F. 3d at 830.  
23 If contradicted, the ALJ may reject an opinion if he states  
24 specific, legitimate reasons that are supported by substantial  
25 evidence. See *Flaten v. Secretary of Health and Human Serv.*, 44  
26 F. 3d 1435, 1463 (9<sup>th</sup> Cir. 1995).

27 In addition to the testimony of a nonexamining medical  
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1 advisor, the ALJ must have other evidence to support a decision to  
2 reject the opinion of a treating physician, such as laboratory  
3 test results, contrary reports from examining physicians, and  
4 testimony from the claimant that was inconsistent with the  
5 treating physician's opinion. *Magallanes v. Bowen*, 881 F.2d 747,  
6 751-52 (9<sup>th</sup> Cir. 1989); *Andrews v. Shalala*, 53 F.3d 1042-43 (9<sup>th</sup>  
7 Cir. 1995).

8 Plaintiff contends that the ALJ improperly relied on the  
9 opinions of testifying experts Drs. Klein and Wolf, and failed to  
10 give appropriate weight to the opinions of treating professionals  
11 Cathy Ciallella, MS, LMHC, and Anna Lee, MA, MHP, and to the  
12 opinion of Mahlon Dalley, Ph.D., who examined plaintiff after the  
13 ALJ's decision. (Ct. Rec. 16 at 9-14.) While less clear,  
14 plaintiff appears to argue that the ALJ also failed to properly  
15 credit the opinions of examining psychologist Clark Ashworth,  
16 Ph.D., and SSI facilitator Ethel Goodman. (Ct. Rec. 16 at 11.)

17 Because the ALJ found plaintiff disabled, the issue on review  
18 is whether he applied the correct legal standards and substantial  
19 evidence supported his determination that DAA is material to the  
20 disability determination; i.e., whether plaintiff would be  
21 disabled if substance abuse ceased.

22 DAA

23 To determine if plaintiff would still be disabled if  
24 substance abuse stopped, the ALJ relied in part on Dr. Klein's  
25 opinion that plaintiff's impairments met Listings 12.04  
26 (depressive syndrome) and 12.09 substance abuse disorder (when DAA  
27 is included), but without substance abuse, plaintiff's mental  
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1 impairments would cause only mild mental limitations. (Tr. 16-  
2 21, referring to Tr. 458-459 and Ex. 4F.)  
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5 The ALJ relied on the testimony of Dr. Klein in assessing  
6 plaintiff's RFC. (Tr. 18-21.) Dr. Klein observed that while Ms.  
7 Lee diagnosed PTSD in 2007, there is no evidence in the record  
8 supporting the diagnosis. (Tr. 459.) He notes there is similarly  
9 no documentation of psychotic features as assessed by Ms. Lee and  
10 Ms. Ciallella (at Tr. 220). (Tr. 460.) Dr. Klein's opinion in  
11 this respect is supported by examining psychologist Clark  
12 Ashworth, Ph.D., who saw no evidence of perceptual disorders.  
13 (Tr. 176.) Dr. Ashworth opined plaintiff's claimed auditory  
14 hallucinations are "not consistent or convincing." (Tr. 179.)

15 Dr. Klein observed that nothing in the record shows  
16 plaintiff's ability to work was impaired by his admitted history  
17 of forty plus years of alcohol abuse (Tr. 460); plaintiff scored  
18 30 out of 30 on the mental status exam given by Ms. Lee (Tr. 133);  
19 and consulting psychologist Mary Gentile, Ph.D., assessed three  
20 areas of moderate limitation (interacting with the public,  
21 accepting instructions and criticism from supervisors, and getting  
22 along with co-workers) (Tr. 148) (Tr. 460). Dr. Klein notes the  
23 evidence of marijuana use and frequent consumption of beer in 2005  
24 (Tr. 220). Dr. Klein refers to records showing plaintiff said he  
25 hurt his shoulder in February of 2006 helping someone move (Tr.  
26 185) and had pain in the neck and shoulder from cutting firewood  
27 (Tr. 383). (Tr. 460-461.) Plaintiff indicates he does not  
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1 socialize, yet, as Dr. Klein points out, he lives with his  
 2 girlfriend and joined the Eagles or the Elks. (Tr. 461.) He  
 3 notes Dr. Ashworth made a rule out malingering diagnosis and  
 4 assessed a GAF of 45,<sup>2</sup>, at a time plaintiff was actively using  
 5 substances (drank week prior to evaluation and smoked marijuana a  
 6 day earlier). (Tr. 461, referring to Tr. 175, 178.)

7 In addition to Dr. Klein's testimony, the ALJ considered the  
 8 evaluations of Ms. Ciallella, Ms. Lee, and Dr. Ashworth. Ms.  
 9 Ciallella evaluated plaintiff on June 27, 2005. (Tr. 220-222.)  
 10 She diagnosed major depressive disorder, severe, without psychotic  
 11 features; psychotic disorder NOS, alcohol dependence in sustained  
 12 partial remission and hallucinagen dependence in sustained full  
 13 remission. (Tr. 220.) She assessed possible diagnoses of  
 14 antisocial personality disorder and cannabis abuse. (Tr. 220.) The  
 15 ALJ notes plaintiff admitted he was currently using marijuana and  
 16 when this assessment was performed. (Tr. 15.) The ALJ observes  
 17 that while Ms. Ciallella found plaintiff had some marked  
 18 limitations, she noted that his hallucinations and delusions could  
 19 be affected by past and current use of hallucinogenic drugs. (Tr.  
 20 15.)

21 The ALJ appropriately rejected Ms. Ciallella's diagnosis because  
 22 the form used did not distinguish between the level of impairment  
 23

24                   <sup>2</sup>A GAF (Global Assessment of Functioning) of 45 indicates  
 25 serious symptoms (e.g., suicidal ideation, severe obsessional  
 26 rituals, frequent shoplifting) or any serious impairment in  
 27 social, occupational, or school functioning (e.g., no friends,  
 28 unable to keep a job).

DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS FOURTH  
 EDITION (DSM-IV), at p. 32.

1 with and without DAA, the relevant issue. (Tr. 20.) The ALJ  
 2 considered Ms. Lee's May 22, 2007 assessment. (Tr. 16, 20.) Ms.  
 3 Lee diagnosed major depressive disorder, recurrent, severe, with  
 4 psychotic features and PTSD. (Tr. 130.) The ALJ notes plaintiff  
 5 told Ms. Lee he had been sober for two years, an untrue statement.  
 6 (Tr. 16, referring to Tr. 131). The ALJ rejected this opinion  
 7 again because plaintiff was actively abusing substances at the  
 8 time of the assessment. (Tr. 20.)

9 The ALJ considered Dr. Ashworth's evaluation in March of  
 10 2006, where it is noted plaintiff underwent alcohol treatment in  
 11 1996 and was seeing a counselor, but continued to drink and use  
 12 marijuana. (Tr. 15.) Dr. Ashworth diagnosed polysubstance abuse  
 13 or dependence not in remission, and, as noted, rule out  
 14 malingering and assessed a GAF of 45. (Tr. 15, referring to Tr.  
 15 175.) The ALJ continued:

16 Dr. Ashworth reported that he did not see overt  
 17 evidence of a psychotic condition and no evidence of  
 18 depression, although he acknowledged that his  
 19 [plaintiff's] depression could have been masked by  
 20 his antidepressant medication. Dr. Ashworth found  
 that the claimant's allegations of auditory  
 hallucinations were not convincing, and his mental  
 status examination was essentially within normal  
 limits. Exhibit 1F.

21 (Tr. 15.)

22 To aid in weighing the conflicting medical evidence, the ALJ  
 23 evaluated plaintiff's credibility and found him less than fully  
 24 credible - an assessment not challenged on appeal. (Tr. 19-20.)  
 25 Credibility determinations bear on evaluations of medical evidence  
 26 when an ALJ is presented with conflicting medical opinions or  
 27 inconsistency between a claimant's subjective complaints and  
 28 diagnosed condition. See *Webb v. Barnhart*, 433 F. 3d 683, 688

1 (9<sup>th</sup> Cir. 2005).

2 It is the province of the ALJ to make credibility  
 3 determinations. *Andrews v. Shalala*, 53 F. 3d 1035, 1039 (9<sup>th</sup> Cir.  
 4 1995). However, the ALJ's findings must be supported by specific  
 5 cogent reasons. *Rashad v. Sullivan*, 903 F. 2d 1229, 1231 (9<sup>th</sup>  
 6 Cir. 1990). Once the claimant produces medical evidence of an  
 7 underlying medical impairment, the ALJ may not discredit testimony  
 8 as to the severity of an impairment because it is unsupported by  
 9 medical evidence. *Reddick v. Chater*, 157 F. 3d 715, 722 (9<sup>th</sup> Cir.  
 10 1998). Absent affirmative evidence of malingering, the ALJ's  
 11 reasons for rejecting the claimant's testimony must be "clear and  
 12 convincing." *Lester v. Chater*, 81 F. 3d 821, 834 (9<sup>th</sup> Cir. 1995).  
 13 "General findings are insufficient: rather the ALJ must identify  
 14 what testimony not credible and what evidence undermines the  
 15 claimant's complaints." *Lester*, 81 F. 3d at 834; *Dodrill v.*  
 16 *Shalala*, 12 F. 3d 915, 918 (9<sup>th</sup> Cir. 1993).

17 The ALJ relied on several factors when assessing credibility,  
 18 including the inconsistencies between plaintiff's statements and  
 19 the medical evidence, between his testimony and daily activities,  
 20 and his infrequent mental health treatment. (Tr. 19-20.) The ALJ  
 21 points out that plaintiff's testimony that he is severely limited  
 22 in the ability to sit, stand, walk and lift is undercut by records  
 23 from treating physician Giannantonio Giuliani, M.D., noting  
 24 plaintiff was "very active and doing lifting" in March of 2006,  
 25 "very active around the house" in April of 2006, and active  
 26 picking berries and cutting firewood in July of 2006. (Tr. 19,  
 27 referring to Tr. 379, 381, 383.) The ALJ notes plaintiff has not  
 28 been truthful with respect to DAA, as in when he told Ms. Lee he

1 had been sober for two years, a statement contradicted elsewhere  
 2 in the record. (Tr. 19.) The ALJ points out plaintiff testified  
 3 he continues to use drugs and alcohol. (Tr. 19, referring to Tr.  
 4 484-485.) And the ALJ notes that plaintiff's very infrequent  
 5 mental health treatment makes it difficult to accept his assertion  
 6 that these problems are disabling. (Tr. 19-20.)

7 Even applying the higher standard, the ALJ's unchallenged  
 8 credibility determination is supported by clear and convincing  
 9 reasons.

10 When he weighed the medical opinions and assessed plaintiff's  
 11 RFC, the ALJ considered plaintiff's credibility, the objective  
 12 medical evidence, the results of psychological testing, and the  
 13 opinions of treating, examining, and reviewing physicians. The  
 14 ALJ notes that treating physician Dr. Giuliani opined on March 31,  
 15 2005, that plaintiff could perform light work. (Tr. 20, referring  
 16 to Tr. 227.) This too undermines plaintiff's claims of disabling  
 17 impairment.

18 Plaintiff contends the court should give weight to the  
 19 opinion of the psychologist who evaluated plaintiff after the  
 20 ALJ's adverse decision and considered by the Appeals Council.  
 21 As the Commissioner correctly observes, the court may consider new  
 22 evidence submitted to the Appeals Council with all of the other  
 23 evidence in the record, in order to determine whether the final  
 24 agency decision is supported by substantial evidence. (Ct. Rec.  
 25 20 at 19, citing *Ramirez v. Shalala*, 8 F.3d 1449, 1451-1452 (9<sup>th</sup>  
 26 Cir. 1993); *Harman v. Apfel*, 211 F.3d 1172, 1180 (9<sup>th</sup> Cir. 2000).  
 27 The Commissioner is also correct that if the court finds that the  
 28 evidence warrants reversing the ALJ's decision, the proper remedy

1 is to remand for further proceedings since it is legal error for  
 2 the court to order payment of benefits based on evidence not  
 3 presented to the ALJ. (Id., citing *Harmon*, 211 F.3d at 1180.)

4 The Appeals Council found Dr. Dalley opined plaintiff's  
 5 limitations were not expected to last more than six months. (Tr.  
 6 2A, referring to Tr. 438.) The Appeals Council further observed  
 7 that Dr. Dalley's report was cumulative because it failed to  
 8 document a change in circumstances or a worsening in his  
 9 condition. (Tr. 2A.)

10 The Appeals Council is correct. Dr. Dalley's opinion that  
 11 plaintiff's condition is expected to last six months rather than  
 12 twelve required has no "reasonable possibility" of changing the  
 13 ALJ's determination. See *Burton v. Heckler*, 724 F.2d 1415, 1417  
 14 (9<sup>th</sup> Cir. 1984). And plaintiff fails to show good cause why the  
 15 report was obtained months after the ALJ's decision. *Clem v.*  
 16 *Sullivan*, 894 F.2d 328, 332 (9<sup>th</sup> Cir. 1990) (citation omitted) (good  
 17 cause not met by obtaining more favorable report after claim  
 18 denied).

19 The ALJ relied on evidence in addition to the testimony of  
 20 the nonexamining experts in rejecting some of the other medical  
 21 opinions. The ALJ rejected some of the opinions of examining  
 22 psychologists based on the opinions of other examining  
 23 psychologists, a specific and legitimate reason. See *Magallanes*,  
 24 881 F. 2d at 751-52 (9<sup>th</sup> Cir. 1989); *Andrews*, 53 F. 3d at 1042-43  
 25 (9<sup>th</sup> Cir. 1995).

26 The ALJ is responsible for reviewing the evidence and  
 27 resolving conflicts or ambiguities in testimony. *Magallanes v.*  
 28 *Bowen*, 881 F. 2d 747, 751 (9<sup>th</sup> Cir. 1989). It is the role of the

1 trier of fact, not this court, to resolve conflicts in evidence.  
2 *Richardson*, 402 U.S. at 400. The court has a limited role in  
3 determining whether the ALJ's decision is supported by substantial  
4 evidence and may not substitute its own judgment for that of the  
5 ALJ, even if it might justifiably have reached a different result  
6 upon de novo review. 42 U.S.C. § 405 (g).

7 The ALJ provided clear and convincing reasons for finding  
8 plaintiff's allegations not fully credible. The ALJ weighed the  
9 medical evidence and found plaintiff disabled when DAA is  
10 included. The ALJ failed to adopt the opinions of some treating  
11 and examining professionals. Instead, he relied on the opinions  
12 of other treating, examining and consulting physicians,  
13 plaintiff's credibility, the results of psychological testing, and  
14 other medical test results.

15 The ALJ's assessment of the medical and other evidence is  
16 supported by the record and free of legal error.

#### 17 CONCLUSION

18 Having reviewed the record and the ALJ's conclusions, this  
19 court finds that the ALJ's decision is free of legal error and  
20 supported by substantial evidence..

#### 21 IT IS ORDERED:

22 1. Defendant's Motion for Summary Judgment (**Ct. Rec. 19**) is  
23 **GRANTED**.

24 2. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 15**) is  
25 **DENIED**.

26 The District Court Executive is directed to file this Order,  
27 provide copies to counsel for Plaintiff and Defendant, enter  
28 judgment in favor of Defendant, and **CLOSE** this file.

1 DATED this 24th day of March, 2009.  
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s/ James P. Hutton

4 JAMES P. HUTTON  
5 UNITED STATES MAGISTRATE JUDGE  
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